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December 6, 2010

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VIA ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket 10-227: Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company FCC Tariff No. 3

Dear Ms. Dortch:

Enclosed for filing please find a duplicate copy of Bluegrass Telephone Company, Inc.'s Response to Qwest Communications Company, LLC's Emergency Application for Review and Sprint Communication Company, L.P.'s Application for Review, which was originally filed on November 18, 2010.

Kentucky Telephone Company submitted its original filing in advance of the Commission's public notice seeking comment in order to ensure that it timely responded to Qwest's self-styled Emergency Application. However, because this filing was made before the Federal Communications Commission generated an electronic case number, the Response does not appear in the Commission's electronic case filing system. Thus, it is being resubmitted in order to ensure that Kentucky Telephone's Response is available with the other filings in this docket.

Please let me know if you have any questions or if you need any further information.

Sincerely,

Ross A. Buntrock

Ross A. Buntrock

Arent Fox

November 18, 2010

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VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company FCC Tariff No. 3 Transmittal No. 3**

Dear Ms. Dortch:

Enclosed for filing, please find the original plus four (4) copies of Bluegrass Telephone Company, Inc.'s Response to Qwest Communications Company, LLC's Emergency Application for Review and Sprint Communications Company, L.P.'s Application for Review.

Also enclosed is a copy of this pleading marked "Stamp and Return." Kindly date-stamp this document and return it to me in the self-address envelope provided.

Please contact me should you have any questions or concerns: 202.775.5734.

Sincerely,

Ross A Buntrock

Ross A. Buntrock

Enclosures

cc: Certificate of Service

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	WCB/Pricing File No. 10-10
Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company	WC Docket No. 10-____
FCC Tariff No. 3, Transmittal No. 3	

BLUEGRASS TELEPHONE COMPANY, INC.'S RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S EMERGENCY APPLICATION FOR REVIEW AND SPRINT COMMUNICATIONS COMPANY, L.P.'S APPLICATION FOR REVIEW

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November 18, 2010

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Washington, D.C. 20554

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BLUEGRASS TELEPHONE COMPANY, INC.'S
RESPONSE TO QWEST COMMUNICATIONS COMPANY, LLC'S
EMERGENCY APPLICATION FOR REVIEW AND
SPRINT COMMUNICATIONS COMPANY, L.P.'S APPLICATION FOR REVIEW

Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company ("Kentucky Telephone"), through counsel and pursuant to 47 C.F.R. § 1.115, hereby responds to the Emergency Application for Review of Qwest Communications Company, LLC ("Qwest Application") filed November 8, 2010 and the Application for Review filed by Sprint Communications Company, LP on November 15, 2010 ("Sprint Application") (collectively, the "Applications" or "Applications for Review"). The Applications for Review, like each of the Petitions to Suspend or Reject Kentucky Telephone's Tariffs, should be denied in their entirety.

Kentucky Telephone's Tariff No. 3 (the "Tariff"), which is effective and "deemed lawful" by operation of law, replaced Kentucky Telephone Tariff No. 2. Qwest and Sprint objected to Tariff No. 2, arguing that it was inherently and patently unlawful because it made clear that the interexchange carriers ("IXCs") could no longer engage in unlawful self help by refusing to pay for traffic that they were delivering to Kentucky Telephone for ultimate termination to Kentucky Telephone's customers that provide conference calling and similar services.[1] Qwest and Sprint also argued that the provision in Tariff No. 2 that required the IXCs to reimburse Kentucky Telephone for reasonable attorneys' fees in the event that the IXCs continue to engage in prohibited withholdings was also unlawful. On September 20, 2010, the Pricing Policy Division ("Division") of the Wireline Competition Bureau released a Public Notice concluding that these objections were unfounded. Specifically, the Division stated:

> Based on this review, we conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.

See FCC Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 10-08, DA 10-1783 (Sept. 20, 2010).

When Kentucky Telephone filed Tariff No. 3, it made material changes to the terms and conditions of the tariff. Specifically, it made changes to the deposit regulations, the procedures for rendering bills, and corrected typographical errors.[2] Qwest and Sprint again opposed Tariff No. 3,[3] but their oppositions rested almost exclusively on the arguments that they already presented in response to Tariff No. 2, which objections were considered and rejected by the

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[1] Notably, Level 3 Communications joined Sprint and Qwest is opposing Tariff No. 2, but chose not to continue the unsupportable protests that were lodged against Tariff No. 3 and have again been lodged by Qwest and Sprint in the Applications for Review.

[2] *Compare, e.g.,* Tariff No. 2, ¶ *3.1.5.6;* ¶ *3.2.1.1 with* Tariff No. 3, ¶ *3.1.5.6;* ¶ *3.2.1.1*

[3] *See In re Bluegrass Tel.Co., Inc. d/b/a Kentucky Tel. Co.*, FCC Tariff No. 3, Transmittal No. 3, Qwest's Petition to Reject or, In the Alternative, Suspend and Investigate (filed Sept. 30, 2010) (the "Petition").

Division. Accordingly, the Pricing Policy Division again rejected these arguments, allowing the Tariff to go into effect and be "deemed lawful" on October 8, 2010.[4]

Apparently dissatisfied with the Division's decision, Qwest now asks the Commission to grant it self-styled "emergency relief" (even though five weeks had passed since the tariff was approved and even though it has not yet paid a single dime to Kentucky Telephone under the Tariff) and Sprint asks the Commission to overrule the decision of the Division. To mix a few metaphors, the question before the Commission is whether it is "three strikes, and you're out," or whether the "third time's a charm" for Qwest and Sprint. As articulated more fully herein, Qwest and Sprint have struck out because the arguments in response to the Tariff did not then and do not now justify suspending or rejecting Kentucky Telephone's Tariff, which was afforded "deemed lawful" status by operation of law.

ABOUT KENTUCKY TELEPHONE

Kentucky Telephone is a rural competitive local exchange carrier ("CLEC") that holds a Certificate of Authority from the Kentucky Public Service Commission. Kentucky Telephone serves business and residential customers in and around Leitchfield, Kentucky. It provides both calling services — local and long distance calling — and high-speed data and broadband Internet access services. Kentucky Telephone also provides digital cable television service.[5]

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4 The Division has similarly rejected similar arguments pressed by Qwest and Sprint with regard to new tariffs filed by Northern Valley Communications, LLC and Tekstar Communications, Inc.

5 Sprint's suggestion that Kentucky Telephone's provision of services to end users residing in or operating a business in rural Kentucky is an "afterthought" is completely without merit. First, Kentucky Telephone serves a number of what Sprint might consider traditional residents and businesses in Kentucky. Moreover, the conference calling services about which Sprint complains are end user customers operating a business in rural Kentucky.

In addition to its residential end users, Kentucky Telephone provides local exchange service to conference calling companies. As the LEC serving these entities, Kentucky Telephone terminates calls placed by the customers of IXCs, including Qwest, to conference bridges.

DISCUSSION

I. MUCH OF QWEST'S APPLICATION FOR REVIEW IS PROCEDURALLY DEFECTIVE AND PROVIDES NO BASIS FOR THE COMMISSION TO OVERTURN THE DIVISION'S DECISION

As an initial matter, several portions of Qwest's Application for Review violate the Commission's rules and must be omitted from consideration. Specifically, the Commission has made clear that, "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c); *see also In re Fireside Media*, Memorandum Opinion and Order, FCC 10-108, 25 FCC Rcd. 7754, 7757, ¶ 5 & n.22 (2010); *North County Commc'ns Corp. v. MetroPCS Cal., LLC*, Order on Review, FCC 09-100, 24 FCC Rcd. 14036, ¶ 25 & n.80 (2009); and *In re Application of Am. Mobilphone, Inc. and RAM Techs., Inc.*, Memorandum Opinion and Order, FCC 00-15, 15 FCC Rcd. 16638, 16639 ¶ 3 (2000). Qwest presents three arguments in its Application for Review that are in contravention of this rule.

A. Argument Regarding the Sufficiency of the Division's Decision

Qwest argues that the Division's decision fails to comply with the Administrative Procedures Act. This argument was not presented to the Division in Qwest's Petition and the Division was not afforded an opportunity to pass by way of a petition for reconsideration (where new questions of law or fact may be presented pursuant to 47 C.F.R. § 1.106). Accordingly, the argument regarding the sufficiency of the Division's decision should be stricken from pages 2, 3, 9 (together with issue presented 1(b)), 10, and 12-15. Arguments regarding a potential violation of the Administrative Procedures Act must be presented to the Division or they are "procedurally barred by Section 1.115(c)" of the Commission's rules. *American Mobilphone, Inc.*, 15 FCC Rcd. at 16639 ¶ 3.[6]

B. Argument Regarding the Definition of "Telecommunications Service"

Qwest argues that Kentucky Telephone's definitions are defective because they do not require end users to pay for the local exchange services that they receive from Kentucky Telephone. To make this argument, for the first time in its Application for Review, Qwest seeks to rely upon the definition of "telecommunications service," which, according to Qwest, requires the officer of telecommunications for a fee to the public. This line of argument was not presented to the Division, indeed the definition of "telecommunications service" which Qwest now seeks to rely upon is nowhere to be found in Qwest's Petition to reject or suspend, and is in violation of Rule 1.115(c). The argument regarding the requirement for an end user to pay for

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[6] In any event, Qwest's argument is without merit and has already been rejected by the Commission. The Commission reasoned:

> . . . it is a basic tenet of administrative law that an agency should be free to develop its own administrative procedures within the limits of governing statutes. Section 154(j) of the Communications Act, 47 U.S.C. § 154(j), empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The Commission thus has substantial discretion to formulate procedures for the consideration of petitions, as long as the agency operates within Section 555(e) of the Administrative Procedure Act, 5 U.S.C. § 555(e), which requires that a denial be accompanied by a brief statement of the grounds therefor and be consistent with the statutory provisions governing tariff filings and review. In the case of review of tariff filings which, by statute, must be done quickly, see 47 U.S.C. §§ 203(b)(1), 204(a)(1), we believe the Commission has heightened discretion not to provide a detailed exposition of its reasoning not to reject or suspend and/or investigate.

In re Bell Atlantic Tel. Co. Tariff FCC No. 1, 8 FCC Rcd. 2732, 2733 ¶ 8 (1993) (footnotes omitted).

"telecommunication service" on pages 17-19 of the Application should be stricken and disregarded.[7]

C. Argument Regarding Section 254(k) Cross Subsidization

Though Section 254(k) of the Act is mentioned in passing on a few occasions in Qwest's Petition, Qwest did not give the Division a meaningful opportunity to pass on this issue in its Petition. The alleged impact of Section 254(k) is not briefed in any manner in Qwest's Petition and Qwest offered no explanation of its theory about how 254(k) could by violated by Kentucky Telephone's tariff. Thus, Qwest failed to meet the requirements of 47 C.F.R. § 1.106 and its argument on pages 23-24 should be disregarded.[8]

II. SPRINT'S APPLICATION FOR REVIEW IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED IN ITS ENTIRETY

Sprint's Application for Review is not in conformance with the Commission's Rules governing Applications for Review and should be dismissed. Specifically, Sprint's Application fails to comport with the explicit requirements of 47 C.F.R. §§ 1.115(b)(1) (requiring a concise statement of issues presented) and (b)(2) (requiring that the basis for the application be stated ***with particularity*** from a finite list). The appropriate resolution of an Application for Review

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[7] It bears noting that in *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.* 22 FCC Rcd. 17973, ¶ 28 (2007) ("*Farmers and Merchants I*"), the FCC concluded that an end user could enter its name for a "free subscription" and noted that offers of "free subscriptions" are quite common. In its reversal of that decision, the Commission did not conclude that "free subscriptions" were *per se* unlawful, as Qwest apparently suggests, but rather that the conference calling companies were not subscribers pursuant to the terms of Farmers' tariffs, and thus could not have received a "free subscription." *See Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 24 FCC Rcd. 14801, ¶ 10 & n.44 (2009) ("*Farmers and Merchants III*") ("Consequently, Farmers' reliance on the October 2 Order's description of 'free subscriptions,' October 2 Order, 22 FCC Rcd. at 17987, ¶ 38, is unavailing, because we find that the conference calling companies did not subscribe to a service offered under Farmers' interstate tariff.").

[8] Given the emphasis Qwest has paid to this new argument in its Application, it is refuted in full in Section VIII, *supra.*

that fails to meet these requirements is for the Commission to dismiss it. *In re Application for A and B Block Broadband PCs Licenses*, 11 FCC Rcd. 17062, 17064-65, ¶ 6 (Apr. 1, 1996) (Petitioners' pleading is defective because it fails to "specify with particularity" any of the above subsections as grounds for granting its Application for Review. . . . Accordingly, we are dismissing Petitioners' Application for Review because it does not comply with 47 C.F.R. § 1.115(b)(2).") (citing *Chapman S. Root Revocable Trust*, 8 FCC Rcd. 4223, 4224 (1993)); *see also In re Deferral of Licensing of MTA Commercial Broadband PCs*, 11 FCC Rcd. 17052, 17057-58, ¶ 9 (1996).

III. THE COMMISSION CANNOT AND SHOULD NOT DECLARE KENTUCKY TELEPHONE'S TARIFF *VOID AB INITIO*

Qwest argues that, even though the Tariff has already become effective, the Commission is free to review the Division's decision, declare it to be invalid, and in so doing simply declare the Tariff *void ab initio*. *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001), upon which Qwest relies, is inapposite. There, the Commission examined a CLEC tariff filed on one days' notice and declared it *void ab initio* because it impermissibly cross-referenced an interconnection agreement between the parties. The D.C. Circuit Court of Appeals upheld the agency's ruling.

The key distinguishing factor between *Global NAPs* and Kentucky Telephone, however, is that Global NAPS chose to file its tariff on **one days' notice** and therefore never triggered the deemed lawful protections afforded by section 204's streamlined tariff filing procedures. By filing the Tariff on fifteen days' notice, and allowing an opportunity for the Division to consider the oppositions filed by Qwest and Sprint, Kentucky Telephone appropriately received the deemed lawful protection, which, by operation of law, forecloses the possibility that the tariff will later be found to be unlawful. *See Farmers and Merchants I*, 22 FCC Rcd. at n.55 (noting that "Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are "deemed lawful."); *cf. also Virgin Islands Tel. Co. v. FCC*, 444 F.3d 666, 673 (D.C. Cir. 2006) (noting that section 204 does not allow the Commission to keep carrier's tariffs in "'almost endlessly suspended animation'") (quoting *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002)). If the Commission were free to simply declare a "deemed lawful" tariff void *ab initio* at any time, it would render meaningless the plain language of section 204. The Commission, therefore, must reject Qwest's suggestion that it can retroactively invalidate the Tariff.

IV. THE TARIFF WAS PROPERLY ALLOWED TO GO INTO EFFECT AND "DEEMED LAWFUL"

Qwest's opening argument is that Tariff No. 3 was not entitled to "deemed lawful" status when it became effective because it is "essentially unchanged" from Tariff No. 2, which the Division declined to give "deemed lawful" status to upon concluding that it was filed on sixteen days' notice. *See* Application at 11-12. In particular, Qwest argues that "no rate reduction or increase" is presented in the Tariff and, according to Qwest, the changes that were made do not strike them as "significant" enough to be treated as a new tariff. *Id.*[9]

Section 204(a)(3) clearly provides that a "local exchange carrier may file with the Commission a new or ***revised*** charge, classification, ***regulation, or practice*** on a streamlined basis" and that the tariff will be "deemed lawful." 47 U.S.C. § 204 (emphasis added). Thus, to be entitled to deemed lawful status, Kentucky Telephone needed only to file a new tariff with a revised regulation or practice on the appropriate notice period, which is exactly what Kentucky Telephone did after the Division concluded that the original tariff was not entitled to the protections afforded by section 204.

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[9] To the extent that Sprint asserted this argument, it now appears to abandon it in its Application for Review as it is not mentioned or discussed by Sprint.

Qwest's argument ignores the material changes that Kentucky Telephone made in the tariff's deposit regulations and the company's procedures for rendering bills. Accordingly, Kentucky Telephone complied with the requirements set forth in section 204 to obtain "deemed lawful" status and the Division so found by declining Qwest's invitation to suspend or reject the Tariff.[10] Accepting Qwest's argument to the contrary, would lead to the absurd result of perpetually blocking Kentucky Telephone's tariff from gaining deemed lawful status unless and until Kentucky Telephone increased or decreased its rate for the services provided under the tariff. Neither the statute nor the regulations compel such an outcome.

V. THE TARIFF'S DEFINITIONS ARE CLEAR AND COMPORT WITH FEDERAL LAW

Qwest and Sprint assert that the Tariff contains definitions that are somehow improper or unclear. The position rests on deliberate myopia, as well as a legal theory that directly contradicts the Commission's analysis throughout the *Farmers & Merchants* case on which much of Qwest's and Sprint's Petitions purported to rely.[11] Simply put, the Tariff definitions contain exactly the information that Qwest has previously claimed was lacking, and it is this clarity that causes Qwest and Sprint to abandon longstanding arguments that the terms of a LEC's tariff, and not federal law, determine when call traffic is compensable under the access

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10 *See In re Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, FCC 97-23, 12 FCC Rcd. 2170, 2203, ¶ 68 (1997) ("*Streamline Tariff Order")* ("We further determine that ***the 15-day notice period shall also apply to tariffs that change terms and conditions*** or apply to new services even where there is no rate increase or decrease. This will result in the most efficient implementation of section 204(a)(3) by minimizing analysis of each filing to determine whether or not it should be considered a rate increase, decrease, or a change in terms and conditions. ***Thus, under the rules we establish, all LEC tariff transmittals, other than those that solely reduce rates, shall be filed on 15-days' notice.*** If there are other significant changes, the tariff transmittal will be subject to a 15-day notice period.") (emphasis added).

11 *Farmers I*, 22 FCC Rcd. 17973; *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615 (2008) ("*Farmers II")*; *Farmers III*, 24 FCC Rcd. 14801.

regime. Stripped of the rhetoric, the Applications, and the Petitions before that, reveal nothing more than a desire to continue to refuse to compensate LECs who complete the calls that that these carrier's long-distance customers willingly place.

In any event, this line of argument ignores entirely that, when reviewing the Tariff, the Division was obligated by Commission rule to presume that Kentucky Telephone's tariff was lawful, unless Qwest or Sprint met the heavy burden of satisfying the requirement of 47 C.F.R. § 1.773(a)(1)(ii) ("tariff filings by nondominant carriers ***will be considered prima facie lawful***" unless the petitioner meets the burden of establishing a "high probability" it will be found unlawful, will substantially harm competition, irreparable injury will result, or suspension is not contrary to public interest). Here, just as they did before the Division, both IXCs ignore entirely the presumption of lawfulness that competitive carriers are entitled and do not even attempt to suggest that they have met any of the standards set forth in the rule. And, as discussed more fully below, Qwest and Sprint could not meet that test because its arguments regarding the Tariff are without merit.

A. The Commission Made Clear Throughout the *Farmers and Merchants* Case That Access Is Governed By A LEC's Tariff

The pervasive theme of the Applications is that Kentucky Telephone is not permitted to define its own access services. The theme appears in the manner in which Qwest ignores the Tariff, particularly its definitions, and then resorts to Commission findings in an unrelated case. Application at 15-19. This tack, however, contravenes the Commission's reasoning throughout *Farmers and Merchants* in which it stated repeatedly that the question whether traffic is compensable is answered in Farmers' access tariff, and not in precedent arising from investigations of completely different carriers.

To determine whether calls placed to Farmers' conference bridge customers generated compensable terminating access, the Enforcement Bureau and the Commission read Farmers' access tariff. *Farmers I*, 22 FCC Rcd. at 17988-89 ¶¶ 36-38. They read the definition of "end user" and "customer" in that tariff, and to assist in their interpretation they read a standard dictionary. *Id*. at 17988 ¶ 38 (quoting *Webster's New Collegiate Dictionary* 1152 (1981)). Unlike Qwest, the Bureau and the Commission did not seek answers in previous orders regarding other LECs' tariffs, because the sole question was whether "Farmers' access charges have been imposed in accordance with its tariff." *Id*. at 17988 ¶ 35.

Later, in stating that the holding of *Farmers I* was under reconsideration, the Enforcement Bureau and the Commission again emphasized that the question under review was whether the calls at issue qualified for terminating access "'under Farmers' tariff.'" *Farmers II*, 23 FCC Rcd. at 1617 ¶ 7 (quoting *Farmers I*). And in the subsequent Commission order, the analysis was confined to "the tariff language at issue here," and "the services described in the tariff." *Farmers III*, 24 FCC Rcd. at 14807 ¶ 15, ¶ 22. Neither the Bureau nor the Commission stepped outside the terms of Farmers' access tariff to decide how to characterize the call traffic.

Qwest, by contrast, resorts to inapposite precedent regarding the terms of other LEC tariffs. For example, it cited to *In re Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, Order Designating Issues for Investigation, 22 FCC Rcd. 16109 (2007). Qwest Petition at 1 n.3. That case, however, regarded incumbent rate-of-return LECs, such as Reasnor Telephone Company, LLC. *See, e.g*., 22 FCC Rcd. at 16110-11 ¶¶ 2, 4. That case has nothing to do with Kentucky Telephone, which is a CLEC. Rate-of-return carriers are subject to entirely different access rules. Compare *In re Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd.

17989, 17992 ¶¶ 6-7 (2007) (rate-of-return access regime) *with* 22 FCC Rcd. at 17994 ¶ 10 (CLEC access regime). Qwest's cited authority is thus irrelevant to the proper scope of the Division's review of the Kentucky Telephone Tariff.

In addition, Qwest's attempt to step outside the language of the Tariff is contrary to its own legal position in its pending litigation with Kentucky Telephone. *Bluegrass Tel. Co. v. Qwest Commc'ns Corp.*, 09-cv-00070, Qwest Memorandum in Support of Motion to Dismiss Claims, ECF No. 8-2, at 13 (W.D. Ky. Dec. 7, 2009) ("the doctrine also binds carriers not only to their filed rates, but to all the terms and conditions of the carrier's tariffs.") (citing *AT&T Co. v. Cent. Office Tel.*, 524 U.S. 214, 223-224 (1998)). There, Qwest has argued that strict adherence to the terms of Kentucky Telephone's tariff in necessary in order to justify its refusal to pay tariffed access charges.[12] Qwest appears to posit the discordant theory that the terms of Kentucky Telephone's access tariffs govern, unless Qwest cannot find a way to evade those terms.

Qwest is required to ignore the language of the Tariff, and instead compare it to irrelevant LEC tariffs, precisely because the Tariff's terms are in fact clear, and they clearly require Qwest and the other IXCs to pay for terminating long-distance calls to Kentucky Telephone customers. Accordingly, Qwest's Application is replete with *ad hominem* barbs about "traffic pumping" and a "scheme," *see, e.g.,* Application at 5-6, in order to distract the Commission from the plain terms of the Tariff. This inflammatory language is unnecessary and unhelpful just as it was to the Division, and the Commission should grant it no weight.

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[12] For example, Qwest argued that Kentucky Telephone's claim for breach of implied contract must be dismissed because, "In addition, the claim implicates the non-justiciability prong of the filed rate doctrine as well, because it effectively would rewrite Bluegrass' tariffs to extend to the terms of the alleged implied contract, an action that would undermine the regulatory authority of the FCC and the Kentucky Commission." *Id.* at 18.

Simply put, Qwest is vexed that Kentucky Telephone amended its access tariff to acknowledge the hyper-semantic litigation tactics that it has employed as a means to attempt to avoid paying for lawfully tariffed access services. These amendments in no way can be construed as a concession by Kentucky Telephone that its previous access tariff was unenforceable, but rather they were made in an effort to avoid addressing, over and over, the lengthy and convoluted "gotcha" arguments that Qwest continually brings to court while refusing to pay for the use of the LEC's networks.

B. The Tariff Properly Defines Its Terms

Qwest challenged several definitions in the Tariff as being "patently unlawful." *See e.g.*, Qwest Petition at 4. These arguments were curious given that many of the definitions adopt the Commission's definitions verbatim, a fact that Qwest overlooked despite its feigned reliance on those definitions. Qwest Petition at 6 & n.16 and n.17 (quoting 47 C.F.R. § 69.2). Kentucky Telephone is aware that the terms of its Tariff must be clear, and it worked diligently to produce clear terms. It thus has complied with applicable federal law. Kentucky Telephone demonstrates herein, as it did for the Buerau, that the challenged definitions in the Tariff are clear, appropriate, and lawful.

1. Kentucky Telephone has properly defined "Switched Access."

Qwest argues that Kentucky Telephone has adopted an improper definition of "switched access" that purportedly "severs the term from the long-standing requirement that switched access services entail *origination* or *termination* of an interstate telecommunication to or from an *end user* of the LEC." Qwest Petition at 12 (emphasis in original). That assertion flatly ignores the language of the Tariff.

The Tariff defines "Switched Access Service" as "**Access** to the Network of the Company for the purpose of receiving or delivering Calls." Tariff, Original Page 9 (emphasis added). "Access" and "Access Service" are defined as follows:

> **includes services and facilities provided for the origination or termination of any interstate or foreign Telecommunication** regardless of the technology used in transmission. This includes, but is not limited to, local exchange, long distance, and data communications services that may use either TDM or Internet Protocol ("IP") or other technology. Access Service includes the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched Transport Termination (fixed); tandem switched Transport Facility (per mile); tandem switching.

Tariff, Original Page 7 (emphasis added).

The portion of the "Access" definition that appears in bold exactly mirrors the Commission's definition of "access service" in Rule 69.2:

> Access service includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication.

47 C.F.R. § 69.2(b). Qwest quoted this definition in the Qwest Petition, but fails to notice that Kentucky Telephone has precisely the same definition in the Tariff. It is thus difficult to understand how the Tariff violates the Commission's rules.

Qwest is likewise incorrect in asserting that the Tariff "severs" access service from the concept of an "end user." To continue the analysis,

> "Telecommunications" is defined as
>
> The transmission, between or among points specified by **the user**, of information of **the user's** choosing, without change in the form or content of the information as sent and received.

Tariff, Original Page 9 (emphasis added). The Tariff thus makes clear that Kentucky Telephone's "access service" is that which originates or terminations a communication to an end user. The Tariff does not divorce the notion of "end user" from its definition of access services, and any reasonable IXC would understand that the services described under the Tariff are compensable.

2. The Tariff clearly defines "End User."

Qwest also argued that the Tariff provides for "a huge and undefined group of 'end users,' a term which itself has been rendered meaningless through redefinition in the tariff." Qwest Petition at 7. The Tariff, however, defines "end user" very clearly and in language that in large part is identical to the Commission's own definition.

The Tariff defines "End User" as

> **[A]ny Customer of an Interstate or Foreign Telecommunications Service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "End User" when such carrier uses a Telecommunications service for administrative purposes and a person or entity that offers Telecommunications services exclusively as a reseller shall be deemed to be an "End User" if all resale transmissions offered by such reseller originate on the premises of such reseller.** Other carriers, including IXCs, are not considered to be End Users under the terms of this Tariff, unless the Company, at its sole discretion, consents to such classification in writing. An End User need not purchase any service provided by the Company.

Tariff, Original Page 8.

The bolded portion of this definition matches the Commission's definition exactly:

> End user means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m). Qwest, which purports to adhere to the Commission's definitions in its analysis, Qwest Petition at 7, again misses this comparison.

What Kentucky Telephone has added to the "end user" definition is simply a clarifying sentence stating that an IXC is not to be deemed an end user in the normal course of business. Kentucky Telephone has found this clarification to be necessary, having realized through its analysis of other access tariffs that the term "end user" appeared to define both the user of access services and the user of retail telecommunications service. It is axiomatic that using one term to refer to two classes of people results in confusion. Here, an end user is the recipient of a long-distance call.

Qwest's position that the Tariff regards a "huge and undefined group of 'end users'" is thus entirely baseless. It is another instance of Qwest's refusal actually to read the terms of the Tariff, and to compare those terms to the Commission's definitions on which it pretends to rely, and thus provides no ground on which to reject or suspect the Tariff.

3. The Tariff clearly defines "Calls."

Qwest then complains that the Tariff improperly defines "Calls," again asserting that the Tariff "seeks to break the link between service to end users and assessment of access charges[.]" Qwest Petition at 14. Qwest again has failed to read the Tariff.

> A "Call" is
>
> **A communication attempt** for which the complete address code (e.g., 0-, 911, or 10 digits) is provided to the Company's switch or equivalent facility. The term "Call" expressly includes communications that are **delivered to, or received from, persons or entities** that include, but are not limited to: conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business **users**.

Tariff, Original Page 9 (emphasis added).

This definition makes clear that a Call, for which terminating access is due (Tariff Section 5.1, Original Page 36), is a communication delivered to a "user" of service. Kentucky Telephone then provides a non-exhaustive list of persons that it considers "users" of its service, having endured years of IXC arguments about what they deem to be a valid end user. Any reasonable interpretation of this language will reach the conclusion that access is due for a telephonic communication to a person or entity that is a user of LEC service.

Each of the definitions that Qwest challenged before the Division are demonstrably clear and in keeping with federal law. Qwest is thus unfounded in asserting that the Tariff has so drastically "redefine[d] switched access service." Qwest Petition at 12. Rather, the Tariff describes its service in the same manner as the access regime always has been understood, and does so clearly. The Division therefore appropriately rejected Qwest's request to reject or investigate the Tariff.

VI. THE TARIFF'S RATE FOR "VOLUME END USER" TRAFFIC IS LAWFUL

Qwest attacked the "Volume End User," or "VEU," rate in the Tariff as "dramatically in excess of a[ ] reasonable level." Qwest Petition at 16. The VEU rate is $0.015 per minute. Tariff Section 7.2.2, Original Page 46. This rate is lower than the NECA rate that rural CLECs such as Bluegrass are entitled to charge under current FCC rules.

Qwest asserted, without foundation, that Kentucky Telephone's costs to originate and terminate traffic "cannot be in excess of the costs incurred by Qwest Corporation (the ILEC associated in ownership with Qwest)" and thus the rate is too high. Qwest Petition at 17. Qwest did not and cannot argue, however, that Kentucky Telephone has any obligation to provide the cost basis of its access rates. The Commission does not require CLECs to cost-justify their access rates. Moreover, Qwest has no basis to know Kentucky Telephone's costs. It bears to mention that Kentucky Telephone is a small CLEC operating in rural areas, and for Qwest to compare its ILEC "associate," an entrenched incumbent carrier that is the dominant LEC in 14 states, to Kentucky Telephone in this manner is preposterous.[13]

Being thus unfounded, the Division appropriately concluded that the challenge to the VEU rate was based in nothing more than its unwillingness to pay Kentucky Telephone for terminating its long-distance customers' calls. Qwest remains unwilling to pay despite the fact that Kentucky Telephone voluntarily has adopted a lower rate for high-volume usage, one that is lower than the NECA rate. Qwest's rate challenge provided no basis to reject or investigate the Tariff.

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13 Sprint complains that it will not be clear which rate should apply to the traffic. However, as Kentucky Telephone pointed out in its opposition to the Petitions, the process of billing and paying for access services is necessarily a cooperative effort between LECs and IXCs. Carriers, if they are acting in good faith, routinely exchange background and supporting information for access invoices. Unfortunately, Qwest and Sprint have declined to engage in such efforts, preferring instead to withhold payment and later send cursory notices of billing disputes. Kentucky Telephone nonetheless remains willing to work with these or any other IXCs to provide information about access services provided under its tariffs. It can supply the IXCs with information about the entities subject to VEU access services and the telephone numbers assigned to those entities in order to ensure that subsequent access bills are predictable and clear. To attack the Tariff *a priori*, however, as Qwest and Sprint have done, is simply not appropriate.

Sprint also complains that the Division did not investigate its unsubstantiated and baseless allegations that Kentucky Telephone does not provide tandem switching and therefore, Sprint alleges, Kentucky Telephone's rates, even at the lower composite rate, are too high. Sprint suggests that Kentucky Telephone did not respond to this argument directly and, therefore, though unproven by Sprint, it must be true. Sprint's suggestion is erroneous for two reasons. First, Sprint has offered nothing more than *ipse dixit* to support its assertions, which, as noted above, is insufficient to meet the standard for having a non-dominant carrier tariff rejected or suspended. Second, Sprint does not even attempt to demonstrate that *if* its factual allegations were correct (which they are not), Kentucky Telephone's composite rate would, in fact, exceed the appropriate benchmark rate. The VEU rate is $0.015 per minute (Tariff Section 7.2.2, Original Page 46), which is far below the applicable NECA rate that Kentucky Telephone lawfully could charge ***even if Kentucky Telephone only charged for local switching***. Kentucky Telephone is entitled to charge NECA Rate Band 8 for local switching, meaning that it can charge up to $0.036899 per minute for local switching alone. *See* NECA Tariff FCC No. 5, § 17.2.3(A), 46th Revised Page 17-11 (July 1, 2010). Sprint's argument is spurious and deserves no consideration.

VII. THE TARIFF'S BILLING DISPUTE LANGUAGE COMPORTS WITH DECADES OF COMMISSION PRECEDENT

Qwest argued that Section 3.1.7.1(b) of the Tariff, which regards billing disputes, has no basis in law or policy. Qwest Petition at 17. Section 3.1.7.1(b) recites the unremarkable proposition that IXCs cannot withhold payment based on a dispute about an access invoice — in other words, they cannot engage in "self-help" refusals to pay. It states

> Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices or portions thereof is a sufficient basis for the Company to deny a dispute for the Buyer's failure to demonstrate that the dispute was made in good faith.

Tariff Section 3.1.7.1(b), Original Page 33.

This provision comports with longstanding Commission precedent against self-help. The Commission has expressly stated that the IXCs' repeated use of self-help by simply refusing to pay tariffed access charges is inappropriate. For example, in the *Seventh Report and Order* in the Access Reform docket, which dealt specifically with CLEC access, the Commission stated:

> Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. **The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services.** Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. **We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system.** Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.

In re Access Charge Reform, CC Docket No. 96-262, Seventh Report and Order, 16 FCC Rcd. 9923, 9932 ¶ 23 (2001) ("*Seventh Report and Order*") (emphasis added).

The Commission later concluded in that order that "an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, **would violate section 201(a)**." *Seventh Report and Order*, 22 FCC Rcd. at 9960 ¶ 94 (emphasis added).

This holding is consistent with decades of FCC precedent prohibiting self-help. "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...." *In re Tel-Central of Jefferson City, Missouri, Inc. v. United Tel. of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339 ¶ 9 (1989). "The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed…." *In re Bus. WATS, Inc. v. AT&T Co.*, 7 FCC Rcd. 7942 ¶ 2 (1989) (citing *In re MCI Telecomms. Corp., Am. Tel. and Tel. Co. & the Pac. Tel. & Tel. Co.*, 62 F.C.C.2d 703 ¶ 6 (1976)).

Kentucky Telephone relied on well settled federal law in adopting a prohibition against self-help in the Tariff. As Qwest is aware, the Tariff language governs the relationship between the parties, now that language precludes Qwest from continuing to withhold payment unlawfully. Their dissatisfaction with this circumstance provided no grounds to reject or investigate the Tariff, and provides no grounds to reverse the Division's decision to allow the tariff to go into effect and be deemed lawful.

VIII. THE TARIFF'S ATTORNEYS' FEES PROVISION IS LAWFUL AND APPROPRIATE

In a last ditch effort to try to continue taking Kentucky Telephone's services for free, Qwest and Sprint argued that the tariff's attorneys' fees provision is unjust and unreasonable and present grounds for which the tariff may be rejected. Qwest Petition at 18 (alleging that the attorney fees provision is, like all the other provisions, "patently unlawful"). Despite these assertions of patent unlawfulness, Qwest and Sprint failed to offer the smallest bit of legal support for this argument and it should give the Commission little pause.[14]

Several courts have awarded carriers attorney fees pursuant to their state and federal tariffs[15] and Qwest and Sprint failed to cite to a single rule or FCC analysis that prevents carriers from including attorneys' fee provisions in their tariffs. Indeed, this provision is especially appropriate here, where the nation's largest telecommunications carriers have been intentionally withholding payments from small, competitive carriers such as Kentucky Telephone, in violation of long-standing precedent, specifically for the purpose of applying economic pressure to these

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14 Indeed, Qwest and Sprint failed to acknowledge that Kentucky Telephone Tariff No. 1 included several provisions that would require customers to cover Kentucky Telephone's attorney fees. *See, e.g.,* Bluegrass Telephone Company, Inc, FCC Tariff No. 1, ¶ 2.1.D.6 ("The Company shall be indemnified, defended and held harmless (including the costs of reasonable attorney's fees) by the Customer or end user from and against any and all claims, loss, demands, suits, expense, or other action or any liability whatsoever, including attorney fees, whether suffered, made, instituted, or asserted by the Customer or by any other party, for any personal injury to or death of any person or persons, and for any loss, damage or destruction of any property. . . ."); *see also* ¶ 2.1.D.7; ¶ 2.3.E ("With respect to any service or facility provided by the Company, Customer shall indemnify, defend and hold harmless the Company from all claims, actions, damages, liabilities, costs, and expenses, including reasonable attorneys' fees . . . ."). None of the IXCs sought to have the tariff suspended on this ground when Bluegrass filed its FCC Tariff No. 1.

15 *See, e.g., In re WorldCom, Inc. v. Commc'ns Network Int'l, Ltd.*, 386 B.R. 496, 515-16 (S.D.N.Y. 2008) (awarding attorney fees, in part, because "The Tariffs also contemplate an award of attorneys' fees."); *AT&T Corp. v. JMC Telecom, LLC*, No. Civ. 99-2578, 2005 WL 2086194 at *2 (D.N.J. Aug. 26, 2005) (awarding attorney fees to AT&T because "…Tariff No. 1, which provides in Section 2.5.3: "In the event [AT&T] incurs fees and expenses, including attorney's fees, in collecting or attempting to collect, any charges owed by [JMC], [JMC] shall be liable to [AT&T] for the payment of all such fees and expenses incurred." (alternation in original)); *WorldCom Techs., Inc. v. Sequel Commc'ns, Inc.*, No. 00 Civ. 1598, 2001 WL 1346178, at *1 (S.D.N.Y. Nov. 1, 2001) (awarding attorney fees and observing that "paragraph 2.5.4. of the FCC Tariffs incorporated by reference into the contract provided that '[i]n the event the Company incurs fees or expenses, including attorneys' fees, court costs, costs of investigation and related expenses in collecting or attempting to collect, any charges owed the Company, the customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred.'") (emphasis added).

carriers. Certainly, an attorneys' fee provisions will not stop these IXCs from continuing their unlawful behavior, but it will help prevent small carriers from being forced out of business merely for asserting their legal rights.

As with each of the fallacious arguments asserted by Qwest and Sprint, the attorneys' fees provision provided no basis to suspend or reject the Tariff.

IX. KENTUCKY TELEPHONE'S TARIFF DOES NOT CREATE A VIOLATION OF SECTION 254(K)

Finally, to the extent that the Commission decides to take up Qwest's new argument that Kentucky Telephone's Tariff is somehow unlawful because it would enable a violation of section 254(k) of the Act,[16] it should find Qwest's argument to be without merit. First, it is highly doubtful that, on the record before it, could ever present a valid basis to reject the Tariff, which itself does not violate 254(k). More to the point, however, Qwest's assertion that Kentucky Telephone could violate 254(k) by paying a conference call provider a marketing fee is simply erroneous.

Further, 47 U.S.C. 254(k) has no application to the facts alleged by Qwest because Kentucky Telephone is a CLEC – and not an ILEC – and is not subject to the provisions of Section 254(k). In implementing Section 254(k), "the Commission established a distinction between carriers with market power and those without."[17] Then speaking to the exact provision to which Qwest bases its claim to relief – *i.e.*, "a telecommunications company may not use services that are not competitive to subsidize services that are subject to competition," – the

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[16] As noted earlier, the Commission should also decline to address this argument because Qwest did not give the Bureau an appropriate opportunity to pass on this argument as required by 47 C.F.R. § 1.115(c).

[17] *In re Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, 12 FCC Rcd. 6415, 6416 ¶ 2 (1997) ("*254(k) Order*").

Commission held that this "provision of section 254(k) addresses the concern that *ILECs* may attempt to gain an unfair market advantage in competitive markets by allocating to their less competitive services, for which subscribers have no available alternative, an excessive portion of the costs incurred by their competitive operations."[18]

In essence, this prohibition against cross-subsidization is intended to address the following situation: ILECs have shared facilities and equipment that are used in both the provision of long-distance service (which is subject to competition) and local exchange service (which became subject to competition for the first time following the enactment of the 1996 amendments to Communications Act of 1934). The former monopolist ILECs, however, were still rate-of-return regulated in their provision of local exchange services. They thus had the incentive to allocate as much of the costs to the rate-of-return side of their operations as it would guarantee them higher rates and profits. To prevent ILECs from doing this, however, Congress enacted Section 254(k), which the Commission in turn implemented by requiring *ILECs* to adhere to rigorous accounting and reporting procedures in order to comply with Section 254(k)'s mandate.[19]

Qwest attempts to make much out of a single sentence in the *254(k) Order*, 12 FCC Rcd. at 6421 ¶ 9, and *AT&T Corp. v. Bus. Telecom, Inc.*, 16 FCC Rcd. 12312, 12339-40 (2001), to suggest that CLECs such as Kentucky Telephone are subject to FCC regulations preventing cross-subsidization. However, nothing Qwest cites actually establishes that Qwest can have Kentucky Telephone's tariff invalidated, even if section 254(k) was applicable (which it is not). Indeed, *Business Telecom* is inapposite here and Qwest's fails to provide the Commission with

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18 *254(k) Order* ¶ 7 (emphasis added).

19 *See* 47 C.F.R. §§ 64.901-64.905.

all of the relevant language of its cited but irrelevant authority. Indeed, Qwest fails to cite the full text of paragraph 61 and intentionally excludes the relevant language in which the FCC expressly declines to specify what, if any, conduct on a CLEC's part could constitute a violation of section 254(k). The Commission there stated that "*we decline to provide what would be merely an advisory opinion* on the lawfulness of BTI's conduct under section 254(k). Therefore, *we deny AT&T's claim under section 254(k)*." *Business Telecom*, 16 FCC Rcd. at 12339-40 ¶ 61 (emphasis added). Accordingly, the Commission expressly declined to provide an advisory opinion, which Qwest here is impermissibly trying to pass off as controlling law.

The Commission, when it found that CLECs have "monopoly control" in the limited sense that they own the path to their own end users (who, incidentally, are free to choose another LEC to provide their local service), could have extended 254(k) to cover this service but did not. Indeed, it could have done so in the *Seventh Report and Order*[20] or *Eighth Report and Order*[21] devoted to CLEC access charges, yet section 254(k) is not even mentioned in those orders.[22]

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20 *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001).

21 *In re Access Charge Reform,* CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, FCC 04-110, 19 FCC Rcd. 9108 (2004) ("*Eighth Report and Order*").

22 Indeed, in the *Seventh Report and Order*, the FCC expressly found that, due to the increased cost of providing access in rural areas and the rural CLECs' inability to average their costs among rural and non-rural areas, rural CLECs were entitled to charge higher access rates, notwithstanding the IXCs' claim that this right would lead to improper subsidies from the IXCs. *See* 16 FCC Rcd. 9923 ¶ 67 ("In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations. . . . Instead, it merely deprives the IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas."). Thus, the FCC was cognizant of the issue of subsidies in this context, and specifically rejected the notion that its rural access charges were themselves subsidies. The Court should decline Qwest's untimely collateral attack on that long-standing FCC ruling.

Qwest is thus asking this Commission to create and apply new federal law in order to invalidate Kentucky Telephone's Tariff. Qwest's invitation is improper, and should be rejected.

CONCLUSION

For these reasons, and consistent with the Division's decision that Kentucky Telephone's Tariff No. 2 and Tariff No. 3 should be allowed to go into effect, the Commission should deny the Applications for Review. Qwest erroneously tries to bolster is arguments with claims never previously presented to the Division in violation of the Commission's rules. The arguments that Qwest and Sprint did present to the Division were without merit and did not justify suspending or rejecting the tariff of Kentucky Telephone, a nondominant carrier. Thus, the Division's decision should be upheld without modification.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. David Carter, hereby certify that on this 18th day of November, 2010, a true and correct copy of the foregoing **BLUEGRASS TELEPHONE COMPANY, INC.'S RESPONSE TO QWEST COMMUNICATIONS CORPORATION'S EMERGENCY APPLICATION FOR REVIEW** was filed via First Class mail, hand delivery *, and electronic mail ** on the following persons:

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